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Supreme Court, U.S.
FILED
OCT 27 1995
OFFICE OF THE CLERK

No. 95-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VERMONT INFORMATION PROCESSING INCORPORATED,

Petitioner,

v.

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. Respondent does not deny that the issue before this Court — whether, consistent with the Constitution, a state may impose a use tax collection obligation on an out-of-state seller that lacks a substantial presence in the taxing state — is both important and likely to recur.

2. Nor does respondent deny that the New York Court of Appeals expressly rejected the requirement of substantial physical presence for imposition of a use tax collection obligation. This Court consistently has permitted states to impose use tax collection obligations only on those out-of-state vendors with a substantial physical presence in the taxing state. *Compare, e.g., Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939) (upholding imposition of sales tax where out-of-state vendor had

salespersons in the taxing state), *with Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) (rejecting imposition of a use tax where out-of-state vendor was present in the state on an occasional basis to make deliveries with its own truck). Likewise, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court held that Quill's limited in-state presence did not constitute "substantial nexus."

Far from giving *Quill* a "meticulous reading," as respondent claims (Resp. Br. in Opp. at 11), the court below could only "extract" its standard, *id.*, by redefining the law in this area. According to the court below, all that is required to satisfy the Commerce Clause is a "minimum connection physical presence." App. 10a. In *Quill*, however, this Court recognized that far more presence is required, stating that "whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." 504 U.S. at 315. Thus, the decision below, rather than "comport[ing] entirely with *Quill*" as respondent claims (Resp. Br. in Opp. at 13), is in direct and obvious conflict with this Court's holding in *Quill*.

3. Respondent does not dispute the essential facts in this case: that VIP has no sales force, officers, agents, or delivery trucks in New York State, and that the sporadic and occasional visits by its out-of-state employees to New York State relate only to software, rather than the hardware upon which New York State imposed the use tax collection obligation.

4. Respondent also errs in treating *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), as both overruled and irrelevant. While that case arose in the Due Process context, this Court has cited it with approval as delineating the Commerce Clause requirements. *See, e.g., National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 558-59 (1977) (discussing physical presence at issue in *Miller Bros.* as insufficient to establish requisite nexus). In *Miller Bros.*, despite the out-of-state vendor's obvious presence in the state through

delivery trucks, this Court held that the requisite nexus was lacking even under the more lenient Due Process standard.

Respondent does not dispute that, if *Miller Bros.* remains good law, it is in conflict with the decision below, in light of the only slight in-state physical presence of the out-of-state vendor in this case. At the same time, respondent suggests (Resp. Br. in Opp. at 15-16) that the Due Process Clause standard for permitting the imposition of a use tax collection obligation on an out-of-state seller is no less stringent than the Commerce Clause standard. But this Court explicitly made clear in *Quill* that the Commerce Clause requires more of a connection with the State than does the Due Process Clause: "Accordingly, contrary to the State's suggestion, a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Quill*, 504 U.S. at 313.

The decision below also is in conflict with this Court's personal jurisdiction cases. Those cases hold that unrelated insubstantial activities in the forum state are insufficient to sustain personal jurisdiction under the Due Process Clause. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984). As a result, such activities surely cannot satisfy the more stringent Commerce Clause standard.[1]

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[1] Respondent's suggestion (Resp. Br. in Opp. at 16) that *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944) held that an out-of-state seller's sporadic activities in the state may give rise to a use tax collection obligation, even where, as here, those sporadic activities are unrelated to the subject of the tax, is flatly wrong. There, contrary to respondent's claim, this Court upheld, under the Commerce Clause, a use tax collection obligation that arose from goods sold in the taxing state by the out-of-state vendor's traveling salesmen. *Id.* at 337. But, as this Court recognized in *Quill*, the presence of a sales force in the taxing state, far from sporadic or unrelated to the subject of the tax, is an instance of substantial physical presence. 504 U.S. at 315; *see Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960).

5. Respondent fails wholly to comprehend the importance of this Court's decision in *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214 (1992), to this case. While repair activities fall outside the protection of the federal statute governing state taxation of income, Public Law 86-272 (codified at 15 U.S.C. § 381), *see* 505 U.S. at 229, this Court's decision in *Wrigley* makes clear that sporadic in-state activities are insufficient to give rise to state income tax liability. 505 U.S. at 231-32. This Court previously has recognized that its decisions in the use tax area are similar to Public Law 86-272, *see Quill*, 504 U.S. at 316 n.9, lending additional support to the conclusion that sporadic in-state activities are not sufficient to give rise to a use tax collection obligation.

6. This case presents important issues, prompt resolution of which is critical to allow both businesses and states to order their affairs.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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